INDEX TO PETITION.

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit ...	1
A. Statement of the Case	2
B. The Questions Presented	11
C. Reasons Relied on for Allowance of the Writ ..	14

INDEX TO BRIEF IN SUPPORT OF PETITION.

	Page
Argument	17
I. The Criminal Provisions of the Emergency Price Control Act Were Not Intended to Apply to a Seller, Otherwise Innocent, Where the Alleged Over-Ceiling Sale Is Instigated by Government Agents in League With a Purchaser Not for Consumption or Use, and Where the Pretended Over-the-Ceiling Money Is Seized by Federal Agents for Return to Such Purchaser in Accordance With Previous Practice and a Prearranged Scheme and Design of the Agents and Purchaser to Arrest and Punish the Seller	17
II. Because of Entrapment, Petitioners' Motion for Judgment of Acquittal Should Have Been Granted	19
III. Petitioners Could Not Be Tried, Over Their Objections, in the District Court for the Western District of Louisiana Where the Government's Proof Shows as the Only Basis for Such Venue the Commission There of an Incidental Act After Conduct Sufficient to Warrant Prosecution in New York, and Where the Government Proves That Commission of Such Act Was Instigated, Induced and Caused by the Federal Agents for the Purpose of Enabling Petitioners' Prosecution and Trial in Louisiana Rather Than New York	24

INDEX TO BRIEF (Continued).

Page

IV. The Trial Court Committed Reversible Error in Denying Petitioners' Motion to Transfer the Proceedings to the Southern District of New York 25

V. Since John, the Informer, Was Never a Co-Conspirator With Petitioners, His Statements Could Not Be Binding Upon Them and Could Not Be Considered in the Determination of Their Guilt 30

VI. The Trial Court's Restriction on the Cross-Examination of the Chief Government Witness Was Prejudicial, Harmful Error 32

VII. The Court Improperly Quashed the Subpoena Directing John to Produce the Books and Records of His Mississippi Business, in Violation of Rule 17 (c) of the Federal Rules of Criminal Procedure, and Thereby Denied Petitioners Their Right to Produce Evidence in Their Own Behalf 35

VIII. The Court's Conduct of the Trial Was, Otherwise, Prejudicially Erroneous 36

A. Improper Remarks of the Trial Judge ... 36

B. Errors in Court's Charge 37

1. The Court assumed that the sale was from one wholesaler to another and accordingly instructed the jury only as to the price ceilings governing such sales 37

2. The Court failed to define the offense properly 38

3. The Court improperly refused to caution the jury on John's testimony ... 38

4. The Court's charge was partial, argumentative and advocated belief in the prosecution's case 39

INDEX TO BRIEF (Continued).

Page

5. Throughout the trial the Court's treatment of John's position was inconsistent. His failure to clarify this vital question in his charge to the jury was fatally erroneous 40

Conclusion 41

TABLE OF CASES CITED.

Page

Alford v. U. S., 282 U. S. 687, 51 S. Ct. 218 ..... 32, 34
Bollenbach v. U. S., 326 U. S. 607, 66 S. Ct. 402 ..... 38, 41
Durant Motor Co. of N. J. v. Georgia Florida Motor Co., 18 F. 2d 95 (C. C. A. 5, 1927) 20
Fiswick v. U. S., 329 U. S. 211, 67 S. Ct. 224 ..... 21, 30, 31
Holmgren v. U. S., 217 U. S. 509, 30 S. Ct. 588 39
Hyde v. Shine, 199 U. S. 62, 25 S. Ct. 760 28
Kotteakos v. U. S., 328 U. S. 750, 66 S. Ct. 1239 32
Langes v. Green, 282 U. S. 531, 51 S. Ct. 243 29
McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608 .. 14, 41
Olmstead v. U. S., 277 U. S. 438, 48 S. Ct. 564 24
Olner v. Piatt, 44 U. S. 333 20
Quercia v. U. S., 289 U. S. 466, 53 S. Ct. 698 ..... 39, 40
Sorrells v. U. S., 287 U. S. 435, 53 S. Ct. 210, 14, 17, 18, 19, 22, 23, 24
Starr v. U. S., 153 U. S. 614, 14 S. Ct. 919 40
U. S. v. Blumenthal, — U. S. —, decided December 22, 1947 32
U. S. v. Johnson, 323 U. S. 273, 66 S. Ct. 28 ..... 15, 29
U. S. v. Max, 156 F. 2d 213 (C. C. A. 3) 38
United States v. National City Lines, 7 F. R. D. 393, 395, 396, 397 (D. C. S. D. Calif.) 28

MISCELLANEOUS.

Page

Criminal Code, § 37, 35 Stat. 1096, 18 U. S. C. A. § 88.. 1

Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. A., App. § 901 et seq. ..1, 11, 18, 24

Federal Rules of Criminal Procedure:

Rule 17 (c) 28, 35

Rule 21 (b) 15, 28, 30

New York University Law School Institute Proceedings, Federal Rules of Criminal Procedure, pp. 167, 168 .....28, 35

Regulation No. 445, §§ 5.3, 5.4, 5.5, 7.8 .....24, 37

United States Constitution:

Article III, § 2, Cl. 3 .....12, 14, 24

Sixth Amendment 12, 14, 24

Wigmore on Evidence (2d Ed.):

Sec. 1367 32

Vol. 4, Sec. 1078 20

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947

No.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Irwin Kott, Israel Needleman and Harry Weiner, respectfully pray that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, in an opinion per Waller, J. filed on October 23, 1947, affirming a judgment of the District Court for the Western District of Louisiana convicting petitioners of a violation of the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904 and 925 and conspiracy to violate the said Act under § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. A. § 88. Petitioner Kott was sentenced to imprisonment for one year and a day on the conspiracy conviction. Petitioners, Needleman and Weiner, were each sentenced to six months imprisonment and fined $10,000.00 on the conspiracy conviction. Imposition of sentence on the convic-

tions of the substantive offense was suspended and petitioners were all placed on probation for a period of five years to begin at the expiration of the sentence imposed for the conspiracy conviction. Following conviction, petitioners were continued on bail pending disposition of their appeal.

On October 23, 1947, the Circuit Court of Appeals ordered a stay of issuance of mandate for thirty days pending the filing of the petition for *writ of certiorari*, petitioners being continued on bail (R.).

On November 10, 1947, Petition for Rehearing was filed in the Circuit Court of Appeals which was denied on November 19, 1947 (R. 335).

On November 19, 1947, the Circuit Court of Appeals ordered a further stay of issuance of the mandate for thirty days pending the filing of the petition for a *writ of certiorari*, petitioners being continued on bail (R.).

On December 13, 1947, the time for filing petition was extended by your Honorable Court until and including January 18, 1948 and on December 20, the Circuit Court of Appeals further stayed its mandate until January 18, 1948 pending an application to your Honorable Court for a *writ of certiorari*, petitioners being continued on bail (R. 335).

A.

STATEMENT OF THE CASE.

Distillers Factors Corporation is a New Jersey corporation which is duly licensed to wholesale whiskey and other liquors (R. 1030). Petitioner, Harry Weiner, its President (R. 32), is a resident of Jackson Heights, New York (R. 37). Petitioner, Israel Needleman, is employed by Distillers Factors Corporation (R. 32) and is a resident of Brooklyn, New York (R. 31). Petitioner, Irwin Kott, is a resident of the City and State of New York (R. 43).

The single transaction which gave rise to these proceedings is the sale by Distillers Factors Corporation to one Comell John in the name of John's Beverage Company,

of Tallulah, Louisiana (a federally and state licensed liquor dealer (R. 48)) of 356 cases of whiskey at an alleged over-the-ceiling price of $20.00 per case. Prior to trial, petitioners moved to transfer the proceedings to the Southern District of New York and in support thereof filed affidavits disclosing that numerous defense witnesses residing in New York, Massachusettes, Maryland and Illinois would voluntarily testify for the defendants if the trial were held in New York, but would not and could not do so if the trial were held in Louisiana because of the great distances from their homes, and places of business, the time which they would lose from their employments in travel and also the lack of transportation and hotel facilities (R. 31-58). District Judge Dawkins, presiding at the trial denied this motion (R. 61) and also refused to allow an appeal from such denial (R. 61-66). Petitioners' trial began on November 4, 1946 and terminated on November 16, 1946. Appropriate motions for judgment of acquittal were filed by petitioners and overruled by the trial judge (R. 763, 764; 786; 1200).

Since the questions raised in this petition challenge the sufficiency of the Government's evidence to sustain the convictions, the prosecution's proof will be summarized.

Comell John, chief Government witness, is a resident of Vicksburg, Miss. (R. 107). He is in the liquor business there (R. 108) in violation of State law (R. 389). He is also connected with the John's Beverage Company (R. 108), which he says is owned by his wife who acquired it with funds he gave her (R. 238). However, whiskey bought in the name of John's Beverage Company in Louisiana was purchased for his own business, John's Distributing Company, in Mississippi (R. 239-40) and John made all of the over-the-ceiling purchases for John's Beverage Company (R. 108; 341). John, himself, could not obtain a liquor permit in Louisiana since he had committed two federal felonies: selling liquor without paying the federal tax and

defrauding the United States through the purchase of food stamps given to indigent people (R. 285).

Apart from Comell John's "connection" with John's Beverage Company of Tallulah, Louisiana, he was actively engaged in substantial bootleg whiskey dealings in Mississippi, which has a constitutional prohibition against traffic in intoxicating liquors (R. 359). All of these whiskey dealings prior to that here in question were at over-the-ceiling prices or on the "black market" (R. 301).

Entangled in the multifarious ramifications of Mississippi corruption (R. 220; 377) and his numerous black market dealings John was obsessed by the fear of prosecution for violation of the income tax laws (301).

As a result, Comell John turned to agents of the federal Alcohol Tax Unit for a possible solution to his dilemma (R. 301). Accordingly, he entered into an arrangement with the Government agents. John says that he told the Alcohol Tax Unit agents that he would operate in this manner: John's Beverage Company in Louisiana would pay the ceiling price for whiskey and he would personally pay the "side" or over ceiling money (R. 239). He was to work hand in glove with the Alcohol Tax Unit by participating in and helping them "make cases" for black market prosecutions (R. 356). In return John was given "immunity" for "over ceiling and a number of other things" (R. 357).

Clyde D. Pace, another Government witness, and chief Alcohol Tax Unit investigator for the State of Louisiana (644) was one of the federal agents with whom John worked directly in "making cases" (R. 323, 333). Pace was a logical choice since he was a former prohibition agent (R. 689) who was well acquainted with John (R. 689). He had known John some 10 or 15 years prior to the events leading up to this case (R. 689) and indeed had been a visitor at John's home (R. 727). By clear arrangement, understanding and agreement with the Alcohol Tax Unit, Comell John bought large quantities of whiskey, in each case agreeing to pay the seller an over-the-ceiling price. But prior to the

sale and during the negotiations, John *knew* that he would get his money back (R. 304). In each instance it was prearranged that the federal agents who with John were "making the cases" should listen in on telephone conversations (R. 323), eavesdrop by dictaphone (R. 120) and be present during face to face conversations between John and the unwary sellers (R. 125; 126; 305; 662). John was advised as negotiations progressed (R. 137; 138; 326; 659), and the agents stood ready to pounce upon the seller shortly after the pretended over-ceiling money was delivered by John (R. 304). Upon signal by John to the federal agents that he had passed the money, the Government men pounced upon the sellers, arrested them, seized the money and returned it to John in accordance with plans (R. 304). But John was never arrested (R. 319).

At least three other such joint enterprises between the federal agents and John were identified by Government witnesses: The so-called "Cooper-Rudy deal", (R. 255; 303) the "Morton deal" (R. 303) and the "Boston" venture (R. 729). In pursuance of their elaborate plan, $26,000 was returned to John in the *Cooper-Rudy* case and $10,000 in the *Morton* case (R. 258; 304). It does not matter how much was returned to John in the Boston matter.

In short, by July, 1945, before John had ever talked to petitioners, there had been devised and put into operation a set scheme whereby Alcohol Tax Unit agents and Comell John plotted, planned and cooperated in the "making of cases" against whiskey wholesalers based upon asserted violations of the O. P. A. price ceiling regulations.

Then, in July, 1945, John in Vicksburg, Mississippi telephoned the New York City office of Distillers Factors Corporation. He asked for one Hillman and upon being informed that Hillman was not there, he inquired of the person who answered the phone, who, he says, was Kott, the price of whiskey (R. 119). Kott refused to quote prices but indicated that he would negotiate in New York (R. 118). Up to this time, John had never had any whiskey dealings

with Distillers Factors Corporation or with any of the petitioners (R. 298, 299), but, over defense objections, John was permitted to testify that Hillman, asserting he represented Distillers Factors Corporation, had, in April, 1945, offered him whiskey at over-ceiling prices (R. 115). John said he told Hillman he was not "interested" and after Hillman gave him the New York telephone number of Distillers Factors Corporation, John immediately communicated with the Alcohol Tax Unit and repeated his conversations with Hillman (R. 116).

Immediately after his telephone call to New York in July, 1945, John communicated with Farrell, District Supervisor of the Alcohol Tax Unit for the 10th District and thus was born the plot and scheme which in this case, as in the Cooper-Rudy, Paul Morton and Boston "deals" was to result in a purchase of whiskey, allegedly at over-the-ceiling and with cash temporarily delivered by John to an unsuspecting seller. The receiver of the cash was to be pounced upon, arrested, and relieved of the money which the Alcohol Tax Unit agents had agreed was to be returned to John. And the case thus being "made", the Government was to proceed with the prosecutions here involved.

According to plan, Agent Pace was sent to New York with John for the express purpose of "catching" the petitioners (R. 296, 685). Practically, the expedition was under the command of Pace. The Alcohol Tax Unit arranged for hotel accommodations (R. 696). The party, consisting of Pace, John and John's friend Patterson, travelled to New York on the same train, drinking and playing cards together enroute (R. 693), and Pace even carried $5,500 of John's cash (R. 710). Upon arrival, Pace immediately communicated with the New York office of the Alcohol Tax Unit and they sought to wire the rooms for dictaphones, but the rooms were not adaptable for this, so Pace tried to obtain different rooms (R. 120; 696). All of this occurred before John communicated with petitioners—the persons to be "caught" (R. 294).

John then telephoned Distillers Factors Corporation and talked to Kott (R. 120). John cutely claimed he was suffering from a knee injury and would be confined to bed for four or five days (R. 121). Kott replied that while it was contrary to the usual custom of Distillers Factors Corporation to do business in a customer's hotel room, under the circumstances they would do it (R. 121). John testified that Kott, Needleman and Weiner visited him that night and although the sale of whiskey was discussed no deal was made (R. 123). He says that the next day (around 8 or 9 A. M.) Kott visited him "unexpectedly" in his hotel room and discovered Pace. John thereupon introduced Pace as "Mr. Hennigan", John's sales manager (R. 125). Pace was thereafter known as Hennigan to petitioners (R. 305). Negotiations continued. A few days later John and Pace visited Needleman and Weiner at their office (R. 126). It was agreed that Needleman would take John and Pace to the office of United Distillers Corporation at Amston, Connecticut, which was operated by N. Tully Semel, (a co-defendant, who was acquitted (R. 1268)).

Throughout the negotiations, Pace and John worked closely together. Pace accompanied John when he visited the Distillers Factors Corporation office (R. 137). Pace arranged for federal agents to follow John and Pace to Connecticut (R. 142) and Pace impressed Patterson into service as one of his assistants (R. 604-605). Still negotiations continued.

The object of these negotiations was John's obtaining 500 cases of "Meadville" bourbon at over-ceiling prices (R. 125). "Meadville" was whiskey bottled in bond by United Distillers Corporation (R. 129).

The Government introduced two documents which were executed by Comell John. The first, G-2, is an agreement between Distillers Factors Corporation and John's Beverage Company dated August 8, 1945. This was signed "John's Beverage Company, by C. John." Briefly, the parties to G-2 agreed that in consideration of Distillers Factors

Corporation obtaining for John's Beverage Company 500 cases of Meadville bourbon, John's Beverage Company would pay $2.00 per case to Distillers Factors Corporation (R. 47-48). This represented a brokerage charge made by Distillers Factors Corporation which was to be "considered part of the 15% mark-up allowed wholesalers by the O. P. A. and which sum you are to deduct from your 15% mark-up, but is in no way to add to the price of this merchandise to the retailer" (R. 48).

G-5 is an affidavit taken by Comell John on August 10, 1945 in which he stated the terms of the agreement between himself, on behalf of John's Beverage Company, and Distillers Factors Corporation, as set forth above, and in which he swore that no "other considerations" had been promised or paid to Distillers Factors Corporation (R. 184, 185). This John signed only after consultation with, and upon the advice of agent Pace (R. 138; 184-6; 659).

In addition, agreement was reached in New York as to the manner and shipment of the whiskey and payment therefor (R. 168-170). But, difficulty was encountered in getting the 500 cases of whiskey and John refused to pay the purchase price until delivery (R. 149; 672). Pace and John then returned to Louisiana (R. 149; 672). Thereafter, John wired Distillers Factors Corporation from Vicksburg stating he was still "interested" in the whiskey (R. 149).

Needleman in New York telephoned John in Mississippi (R. 150). As a result, Kott was sent to Mississippi (R. 150) and it was finally agreed that Distillers Factors Corporation would arrange for United Distillers Corporation to ship 356 cases of whiskey to John's Beverage Company in Tallulah, Louisiana (R. 150-153). The ceiling price of $37.97 per case was to be paid by letter of credit which was to be sent up to Distillers Factors Corporation and exchanged for a negotiable bill of lading (R. 154). Kott in Mississippi would pick up the brokerage fee of $712. and $7120. in cash representing $20.00 a case over-the-ceiling price (R. 152).

John and the Alcohol Tax Unit agents were now poised for the kill. John reported his success in getting Kott to come down to Mississippi (R. 151). But the federal agents were not completely satisfied. They wanted the money to be paid over in Tallulah "so that the whole transaction could be transacted in Louisiana" (R. 326). John "was advised by the Alcohol Tax Unit to do that" (R. 326). Alcohol Tax Unit agents had "told me (John) previous (sic) that they would rather have it consummated in Tallulah" (R. 332). The agents insisted upon having the money passed in Louisiana so that the arrest, prosecution and trial could be held there (R. 637). This is apparent from the testimony of Barlow, another Alcohol Tax Unit agent who admitted that the scheme to bring Kott into Louisiana for purposes of arrest was devised and plotted by the federal agents on September 6, 1945, fully two days before Kott even arrived in Mississippi (R. 640; 672). Barlow says that on the 6th of September, he "had been informed in the station that there would be a transaction made in Tallulah" (R. 637). And Pace, himself, stated that he was "trying to get this violation down here for trial" (R. 731).

Accordingly, the next day (7th of September) Alcohol Tax Unit agents and John counted out and marked $7120. in cash in Mississippi, wrapped these marked bills in a small package and that night took the money to Tallulah, where it was placed in the safe of John's Beverage Company (R. 677). The agents arranged that John would meet Kott in Mississippi and inveigle him to come to Tallulah, Louisiana (R. 151; 326). John did meet Kott in Mississippi and reported the meeting to the federal agents (R. 164). The next day, John picked up Kott at the Hotel Vicksburg, Vicksburg, Mississippi, and drove him to the John's Beverage Company offices in Tallulah (R. 164). The whiskey had been loaded under a negotiable bill of lading which was being held by Distillers Factors Corporation (R. 459; 463; 482; 484). John gave Kott the money (R. 169). Kott

so informed Needleman by phone, but John refused to permit Kott to leave until confirmation was received that Distillers Factors Corporation had surrendered the bill of lading to the Manufacturers Trust Company in New York against the letter of credit as arranged (R. 169). Such confirmation arrived about noon (R. 169-170).

The scene was now set for the climax of the sordid drama. After learning that the whiskey had been shipped and the bill of lading delivered to his New York agents, John permitted Kott to leave and offered to drive him back to Vicksburg (R. 171). In accordance with well-rehearsed, prearranged plans, John gave the strategically stationed Alcohol Tax Unit agents the signal indicating Kott had the $7120 (R. 172). John and Kott then proceeded to Vicksburg in John's car. They were headed off by the Alcohol Tax Unit agents who arrested Kott, and seized the money (R. 172). John was not arrested (R. 319). Thus, the scheme "engineered" by John and the Alcohol Tax Unit (R. 320) was consummated.

The defense was a complete denial that there was any over-the-ceiling transaction; that Kott was an independent broker and not an agent or employee of Distillers Factors Corporation (R. 1036); that through his obtaining warehouse receipts from the American Distillery Company, which he turned over to Distillers Factors Corporation, Kott had obtained a commitment for approximately 1400 cases of whiskey from Distillers Factors Corporation (R. 1113); that United Distillers, in turn, was obligated to deliver approximately 1446 cases of whiskey to the order of Distillers Factors Corporation (R. 874); that Kott entered into a "deal" with John whereby John was to split with Kott the large profits he would make by selling the whiskey in Mississippi (R. 1067); that Kott was to go to Mississippi to get "his end of it" (R. 1122); that Distillers Factors Corporation was not holding up surrender of the bill of lading pending word from Kott that the money had been paid but that Kott had in fact called in an effort to learn

whether the bill of lading had yet been delivered (R. 1126); and that Needleman retorted sharply to Kott stating that he had already given instructions to deliver the bill of lading and suggesting that Kott "find out what happened to the bill of lading" (R. 1126).

The petitioners, Weiner and Needleman, contradicted John and Pace in many important details, which will not now be alluded to, but some of which will be referred to hereinafter in the section of the brief urging petitioners' right to a new trial.

The learned trial judge in effect directed a verdict of acquittal on the first two counts charging an offer and agreement to sell at over-the-ceiling prices. The jury found petitioners, Kott, Needleman and Weiner, guilty on Counts 3 and 4, charging an offer and agreement to sell. Semel was found not guilty on all counts.

B.
THE QUESTIONS PRESENTED.

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

(1) Was the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904 and 925, which denounces generally as criminal the sale of a commodity in excess of ceiling price, as fixed by regulation thereunder, intended to apply to a seller otherwise innocent where the alleged over ceiling sale is instigated by government agents in league with a purchaser not for use or consumption, and where the pretended over-the-ceiling money is seized by federal agents for return to such purchaser in accordance with previous practice and a prearranged scheme and design of the agents and the purchaser to arrest and punish the seller?

(2) Was the defense of entrapment proved as a matter of law and was judgment of acquittal required where the

government's evidence proved that a whiskey dealer had a continuing agreement that he would work with Alcohol Tax Unit agents in "making" cases against sellers, who would then be prosecuted as price ceiling violators, in return for personal immunity, and, pursuant to said arrangement, petitioners were incited, ensnared and induced to make what they believed were sales at over-the-ceiling prices; especially where, as here, the continuing arrangement was that the over-the-ceiling money be seized by the federal agents immediately upon its delivery to the seller and be by them returned to the purchaser?

(3) Does a trial in the District Court of Louisiana, over petitioners' objection, violate the protection afforded by the United States Constitution Art. III, § 2, Cl. 3, and the Sixth Amendment where petitioners, according to the government's proofs, had *first* committed all the acts necessary to constitute the asserted offense in the State of New York, and were *thereafter* inveigled by federal agents into the commission of an incidental act in Louisiana for the purpose of affording a basis of venue there?

(4) Where petitioners, New York residents, moved to transfer the proceeding from the District Court for the Western District of Louisiana to the District Court for the Southern District of New York, pursuant to the provisions of Rule 21 (b) Federal Rules of Criminal Procedure, and it appeared from the indictment that the offenses charged were committed both in New York and Louisiana and it further appeared from uncontroverted affidavits that numerous defense witnesses who resided in New York, Massachusetts, Illinois and Maryland, would testify voluntarily if the trial were held in New York but could not and would not do so in Louisiana because of the inordinate traveling distances, expenses and time away from their homes, businesses and employments, and where no countervailing reason for holding the trial in Louisiana appears, is the denial of the motion reviewable and if so, was refusal of transfer reversible error?

(5) Did the trial court commit reversible error in holding that the whiskey dealer who was in league with Alcohol Tax Unit agents to entrap petitioners was a co-conspirator and that his conversations with one of such agents were admissible against all petitioners?

(6) Did the trial court commit reversible error in admitting in evidence against all petitioners conversations between such whiskey dealer, and an alleged agent of the petitioners, without independent proof of the alleged agent's agency or complicity in the alleged conspiracy?

(7) Did the trial court commit reversible error in refusing to allow cross-examination of the chief government witness before the jury until after that witness had first been cross-examined by defense counsel in the absence of the jury, and then limiting the cross-examination to the questions there ruled allowable; thus in effect rehearsing the witness and thereby destroying many criteria by which the jury could judge the witness's veracity?

(8) Did the trial court deny petitioners' right to produce evidence in their own behalf and thus deprive them of due process of law by refusing to enforce a subpoena directed to the chief government witness (under Rule 17 (c) of the Federal Rules of Criminal Procedure) compelling him to produce the books and records of his business in Mississippi, there being no showing that this subpoena was "unreasonable or oppressive"?

(9) Were petitioners denied a fair, impartial trial by the trial court's uttering in the presence of the jury improper remarks which were highly prejudicial and biased against them; failure of the trial court to instruct the jury on the essential elements of the offense charged; charging the jury in an argumentative manner advocating the Government's cause; and otherwise charging the jury in a misleading and improper manner?

C.
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

In the decision sought to be reviewed, the Circuit Court of Appeals has decided important questions of federal criminal law which have not been, but which should be settled by this court; has decided federal questions in a way probably in conflict with applicable decisions of this Honorable Court, and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of your Honorable Court's power of supervision under the rule of *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608. The decision sought to be reviewed invades constitutional rights and sanctions an application of a criminal statute in a manner which is "so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." *Sorrells v. United States,* 287 U. S. 435, 446, 53 S. Ct. 210.

If the decision sought to be reviewed is allowed to stand, it will place in the hands of federal agents the power to provoke, incite and lure legitimate businessmen into violations of the very law which the government agents are supposedly enforcing. It will also place power in the federal agents to assure the trial of defendants at a place thousands of miles distant from the residences, places of business, and domiciles of defendants and defense witnesses by luring a defendant into the commission at such far away and well chosen spot of an additional act over and above that necessary to warrant prosecution for the offense, thus violating the protection afforded by the United States Constitution, Article III, § 2, cl. 3, and the Sixth Amendment.

Finally, it will permit trial judges in effect to prejudge cases and assure convictions by a purported exercise of discretion in denying proper motions to transfer proceedings to other districts where the offense, if any, has also been

committed in the district of defendant's domicile, place of business, and where his witnesses are available and thereby completely to ignore the "unfairness and hardship to which trial in an environment alien to the accused exposes him" *U. S. v. Johnson,* 323 U. S. 273, 275, 66 S. Ct. 28, and thus to sanction the perpetuation of the very abuses which led to the promulgation of Rule 21 (b) Federal Rules of Criminal Procedure.

Apart from such widespread effect on the administration of criminal justice in the federal courts, the decision sought to be reviewed, if permitted to stand uncorrected, will result in a denial to the petitioners of their fundamental rights to a fair, impartial trial according to the rules laid down heretofore by this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated Jan. 16, 1948.

ISRAEL NEEDLEMAN,
HARRY WEINER,
Petitioners.

By DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners.

IRWIN KOTT,
Petitioner.

By LOUIS HALLE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

The Criminal Provisions of the Emergency Price Control Act Were Not Intended to Apply to a Seller, Otherwise Innocent, Where the Alleged Over-Ceiling Sale Is Instigated by Government Agents in League With a Purchaser Not for Consumption or Use, and Where the Pretended Over-the-Ceiling Money Is Seized by Federal Agents for Return to Such Purchaser in Accordance With Previous Practice and a Prearranged Scheme and Design of the Agents and Purchaser to Arrest and Punish the Seller.

(Question 1.)

In *Sorrells v. U. S.*, 287 U. S. 435, 53 S. Ct. 210, the majority of this Court held that a federal prohibition statute, though denouncing in general terms conduct as criminal, may be found not to have been intended to apply where the conduct is instigated by federal agents for the purpose of luring a person, otherwise free from guilt, to the commission of the act so that he may be arrested and punished. In doing so it gave expression to the view that a criminal statute should not be applied where to do so would create a situation so shocking to a proper sense of justice as to invoke a call for the court "to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." In short, as articulated by the minority of the court deciding the *Sorrells* case, the Act creating the offence is to be construed "by reading in a condition or

proviso that if the offender shall have been entrapped into crime the law shall not apply to him." *Sorrells v. U. S.*, supra, at p. 456.

In construing the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. A., App. § 901 *et seq.*, heed must be paid to the express purposes enumerated in Title 1, § 1 thereof, 50 U. S. C. A. App. § 901. From these, it is at once apparent that Congress was primarily protecting the *ultimate consumer* and the nation at large from inflationary practices by those engaged in trades or businesses, whether buyers or sellers. And, in § 4, 50 U. S. C. A., App. § 904, the penal section, it is expressly provided that

> "It shall be unlawful, . . . for any person to sell or deliver any commodity, *or in the course of trade or business to buy or receive any commodity* . . . in violation of any regulation. . . ." (Emphasis supplied.)

Therefore, the purchaser in this case upon whose testimony the Government rests the entire foundation of petitioners' guilt is in *pari delicto* with the petitioners. This was recognized by the Court below which stated (p. 9 of its Slip Opinion, R. [illegible]):

> "Admittedly he entered into an unlawful agreement to buy liquor above the lawful price and any expectation that the Federal agents would recapture the money paid by him and return it to him would not make his act legal."

Yet, the same court approves the conduct of the federal agents who were, as already set forth hereinabove, not only in league with the purchaser, promising him immunity (R. 357), but were "cooperating" with him in the "making of cases" against price ceiling violators in the liquor trade as part of an arrangement whereby in return for his services in "catching" petitioners and other liquor wholesalers (R. 255; 303; 356; 729) he not only obtained whiskey at ceil-

ing price or below but also avoided serious income tax difficulties (R. 301).

A mere reading of the testimony of John, the informer, and Pace and Barlow, the Alcohol Tax Unit investigators, as summarized hereinabove, shows that the real and heinous conspiracy proved by the Government was that between John and the Alcohol Tax Unit agents. It is submitted that Congress never intended the application of the criminal provisions of the Act to apply to such sordid sales trumped up and engineered by a self-confessed bootlegger and black marketeer in co-partnership with federal agents obligated to enforce the Internal Revenue laws of the United States.

II.

Because of Entrapment, Petitioners' Motion for Judgment of Acquittal Should Have Been Granted.

(Questions 2 and 6.)

A.

Petitioners urge that under the principles enunciated in the majority opinion of the *Sorrells* case, the entrapment *proved by the Government* necessitated a judgment of acquittal since there was no properly admitted evidence from which the jury could infer that the petitioners had previously committed offenses of selling whiskey at prices in excess of price ceilings or had possessed a previous reputation for doing so.

To prevent judgment of acquittal, both the trial court and the court below necessarily relied upon testimony concerning one Hillman, named in the indictment as a co-conspirator but not indicted and not produced as a witness.

John, the informer, was permitted, over vigorous defense objections, to testify that in April, 1945 (some four months prior to the first contact in the series of events beginning in July, 1945 which led to the sale of the 356 cases of whiskey and the present indictments), Hillman

visited him and stated that he represented Distillers Factors Corporation, and offered to sell John whiskey at prices in excess of ceiling (R. 108-116). After rejecting the offer, John says he immediately reported it to the Alcohol Tax Unit (R. 116). Pace was also permitted over defense objections to testify that John informed the Alcohol Tax Unit of such offer (R. 646, 649, 651). John also testified that Hillman gave him the phone number of the Distillers Factors Corporation, which he called four months later (R. 115) in opening negotiations for the sale which is the subject matter of the present indictments.

This action of the trial court, affirmed by the Circuit Court of Appeals, permits Hillman to be treated as an agent and co-conspirator of petitioners solely on the alleged conversation of Hillman with John. But, such conversation is inadmissible except upon independent proof of Hillman's agency on behalf of petitioners or complicity with petitioners in a conspiracy, if one be proved. Nothing can be better settled than that agency cannot be proved by an agent's acts or declarations. [*Oliver v. Piatt*, 44 U. S. 333; *Durant Motor Co. of N. J. v. Georgia Florida Motor Co.*, 18 F. 2d 95 (C. C. A 5, 1927), to cite but a few of the multitude of cases upholding this elementary proposition; and see 4 *Wigmore Evidence*, § 1078, p. 123, particularly footnote 5.] Nevertheless, the trial court violated this elementary rule of evidence. By its affirmance, the Circuit Court of Appeals similarly permitted the Government to lift itself by its own bootstraps in introducing such damaging hearsay declarations in evidence against petitioners. Nor are these hearsay statements rendered admissible merely because the same witness, John, says that when he called the telephone number given him by Hillman four months previously, he was informed by the person answering the call that Hillman was not there (R. 119). Rather, this supports the conclusion that Hillman was *not* an agent or co-conspirator of petitioners.

Effort was made, upon an alternative ground, to support the admission of the Hillman-John conversations. It is said by both courts below that John was a co-conspirator and therefore the conversation with Hillman was admissible. The fallacy of this reasoning is apparent. It will be dissected under point V, *infra*, showing that such alternative ground is in violation of *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224.

The whole structure of the Government's view that there was here a "legal" entrapment rested on proof of the Hillman offer in April, 1945. So far as the *actual sale* is concerned, the Government's theory and proof is that John, in league with Alcohol Tax Unit agents made the first contact with petitioners in July, 1945 (R. 119) and that when John in Mississippi phoned New York offering to purchase *whiskey from petitioners, he had never had any previous dealings with any of them* (R. 298, 299). And there was no evidence that petitioners had any previous illegal dealings with anybody.

Once the hearsay statements as to what Hillman purportedly said are stricken out, as we maintain they must be, the structure collapses.

No evidence in this record warrants the Judge's charge in this respect:

> ". . . does the evidence reasonably tend to show that they were engaged in the black market business? If it shows, and if you are convinced beyond a reasonable doubt, that they were *already* engaged in that business insofar as the sale of liquor at black market was concerned, then what happened, or what took place would not constitute entrapment. . . ." (R. 1238) (Italics supplied.)

Nor is there warrant in the record for the statement of the court below that "These circumstances are such as would justify the jury in concluding that Kott and his associates were not novices in the black marketing of liquor."

(Slip Opinion, p. 8, R. 324) In support of this conclusion, the Circuit Court relies upon John's testimony that Kott declined to give him prices over the telephone but that if John would come to New York Kott would then make him a proposition. (Slip Opinion, p. 8, R. 324) The obvious answer to this is the fact that John was telephoning from Vicksburg, in Mississippi, which as a matter of common knowledge is a constitutionally "dry" state. Kott's refusal then to deal with John is therefore readily understandable since to do so contained the risk of a violation of both Federal and State liquor laws. Many other valid reasons for not coming to terms with John in an initial contact over the long distance telephone might have existed. Certainly, such testimony by John is not evidence which justifies a jury in concluding that petitioners had *previously* violated the price ceiling laws, as incorrectly assumed by the Court below.

There being no properly admitted evidence of petitioners' prior transgressions, it follows therefore that an "illegal" entrapment was proved by the government witnesses and accordingly, petitioners were entitled to a judgment of acquittal.

B.

Petitioners recognize that the minority view expressed in *Sorrells v. U. S.*, 287 U. S. 435, 53 S. Ct. 210, has not thus far been accepted by this Honorable Court. Nevertheless, petitioners respectfully submit that the principles expressed therein so cogently by Justice Roberts, and concurred in by Justices Brandeis and Stone, warrant re-examination by this Honorable Court. The fantastic facts of this case so brazenly testified to by the Government witnesses demonstrate the futility of distinguishing between "entrapment" where a defendant had a bad reputation or had previously committed a similar crime and where there is no such evidence of prior transgressions or bad reputation.

A defendant's guilt can only rest upon the commission of the offense with which he is charged. Concededly, evidence of past similar offenses may be *admissible* for the restricted purpose of showing wilfulness, intent or lack of inadvertence. But no one seriously contends that such proof may be *substantive evidence* of the commission of the particular offense with which a defendant is charged (except when the act is the exceptional one involving a predilection to do it). While a jury is permitted from such proof to find that *if* the defendant did the act denounced, he did so with criminal intent, it cannot find that *because* defendant committed *similar* offenses he did the act for which he is now being tried. Nor can it be logically stated that the offense of the officer instigating the crime for which the defendant is being tried is any the less to be condemned because he heard that the defendant had a bad reputation or that he had previously acted in violation of a prohibiting statute. The officer's function is to *prevent* crime not to *commit* it. Nor is it his function to cause a former offender to revert to his criminal career.

The court below, in affirming the petitioners' conviction, inferentially distinguished between a "legal" and an "illegal" entrapment. (See Slip Opinion, p. 8, R. 329). But, as stated in the minority opinion in *Sorrells v. U. S.*., at p. 459, this "in effect, pivots conviction in such cases, not on the commission of the crime charged but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."

Here, as has already been demonstrated, the properly admitted evidence does not support the conclusion that petitioners suffered from a prior bad reputation as price-ceiling violators or that they had previously committed such offenses. Therefore, even under the majority view of the *Sorrells* case an *"illegal"* entrapment was disclosed by the testimony of the Government's witnesses.

Moreover, here, the transaction itself was perfectly legal. The seller had a legal right to sell the whiskey.

Any illegality could arise only from the asserted violation of the price-ceiling regulation. This case is therefore substantially different from those where the entire act is illicit, such as the narcotics cases.

It is respectfully urged that by application of the principles expressed in both the majority and minority opinions of *Sorrells v. U. S.*, petitioners were entitled to judgments of acquittal on the testimony of the Government's witnesses.

III.

Petitioners Could Not Be Tried, Over Their Objections, in the District Court for the Western District of Louisiana Where the Government's Proof Shows as the Only Basis for Such Venue the Commission There of an Incidental Act After Conduct Sufficient to Warrant Prosecution in New York, and Where the Government Proves that Commission of Such Act Was Instigated, Induced and Caused by the Federal Agents for the Purpose of Enabling Petitioners' Prosecution and Trial in Louisiana Rather than New York.

(Question 3)

This record proves that by prearranged schemes between John and the federal agents Kott was ensnared and entrapped into entering Louisiana and there accepting the alleged over-the-ceiling money for the purpose of "getting this violation down here for trial" in Louisiana (R. 731; 321; 326; 332; 390; 637; 639; 640).

Petitioners concede that apart from this "dirty business" (per Holmes, J. dissenting in *Olmstead v. U. S.*, 277 U. S. 438, 470, 48 S. Ct. 564) venue for their trial in Louisiana would exist.

However, petitioners contend that the abhorrent conduct of the Government agents in deceitfully luring and ensnaring Kott into the commission of an act in Louisiana (acceptance of the pretended over-the-ceiling money) in order to expose the petitioners to the unfairness and hard-

ship of trial in the Western District of Louisiana withdraws from such overt act the quality—which otherwise it would have possessed—of clothing the Louisiana courts with venue. Upon the Government's evidence the offense, if any, had already been committed in New York prior to the inveigling of Kott into Louisiana. The Act itself (50 U. S. C. A. App § 942) defines a "sale" as follows: "(a) The term 'sale' includes sales . . . and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly." Therefore, payment of the entire or part of the purchase price is not essential. It is not made part of the offense, and is not even mentioned in the Act or pertinent Regulations (Regulation No. 445, §§ 5.3; 5.4; 5.5; and 7.8). Consequently, the acceptance of the alleged over-the-ceiling money by Kott was an act purely incidental to and not a constituent element of the offense herein charged.

Petitioners urge that their trial, under the circumstances, was as much a violation of their protection under Article 3, § 2, Cl. 3, and the Sixth Amendment of the Constitution as if no overt act had been committed in Louisiana. Consideration of the fair administration of criminal justice and the effective enforcement of the criminal laws supports this view and requires the conclusion that the District Court for the Western District of Louisiana had no venue.

IV.

The Trial Court Committed Reversible Error in Denying Petitioners' Motion to Transfer the Proceedings to the Southern District of New York.

(Question 4)

Prior to trial, petitioners moved under Rule 21 (b) to transfer the proceedings from the Western District of Louisiana to the Southern District of New York (R. 50-55). In support of the motion, affidavits were filed (R. 31-48). From the motion and supporting affidavits, it appears that

the petitioners are residents of New York; that the negotiations for the purchase of the liquor took place in petitioner Weiner's office in New York; that the negotiations lasted for a period of about 10 days; that office personnel were in a position to hear and see what occurred during such negotiations; that four other persons saw and heard the negotiations; that two women guests of John and Pace were in the hotel rooms during the conference there; and that all of such persons residing in New York would be called as witnesses to prove that the transaction was in accordance with controlling regulations (R. 31-48). Additionally, petitioners averred that the notary before whom John swore to the facts contained in affidavit G-2 (R. 47) resides in New York and would be called to rebut John's denial (in removal proceedings previously held in New York) that he took the affidavit in the presence of the notary (R. 34). Petitioners further showed that they would call five witnesses to prove a similar course of conduct on the part of Pace and John in Boston, Massachusettes in their endeavor to entrap other persons into the commission of similar offenses (R. 34); that such witnesses reside in Boston and expressed a willingness voluntarily to come to New York to testify on behalf of the petitioners (R. 34, 35), as would another witness to a similar entrapment in Chicago (R. 35).

Petitioners further showed that they intended to call three witnesses residing in Baltimore, Maryland, to prove yet another similar entrapment, and that such witnesses would voluntarily come to New York to testify on behalf of petitioners (R. 35). Petitioner, Weiner, averred an intention to call character witnesses residing in New York, and witnesses to prove that he was absent from New York during the negotiations (R. 38). Finally, petitioners averred that the cost of bringing all such witnesses to Monroe, Louisiana for an extended trial would be prohibitive and that such witnesses could not afford to absent themselves and would not voluntarily do so for such an extended period of time from their homes and businesses

(R. 36), particularly, in view of lack of full travel facilities to Louisiana (R. 36), the impracticability of quartering all these witnesses in Monroe, Louisiana because of scarcity of hotel space there; and that without such witnesses petitioners "could not receive fair trial (s) as guaranteed" to them "by the Constitution of the United States of America" (R. 36).

None of the above enumerated facts were controverted. Nor was there any showing why convenience to the government required the trial to be held in Louisiana.

Yet, the trial court summarily dismissed the motion to transfer, apparently on the ground that to do so was not an "abuse of discretion" and hence not even reviewable. This is apparent from the following remarks of the trial court upon a motion for allowance of an appeal from the denial of transfer:

> "In other words, if as the Government contends, these defendants were engaged in the business up there of operating a distillery and dealing in black market liquor, and so forth, it would be somewhat unique, to say the least, to have them carry that on, and stay *within their hole,* so to speak, and then when a criminal case against them might arise in some other jurisdiction, or some other section to say that it could not be heard in that section, but that it must be brought back there to their own doorsteps to be tried . . .
>
> • • •
>
> "If this matter is one that is within the discretion of this Court, and if the showing here is *not sufficient to constitute an abuse of the discretion of the Court,* then this order is not appealable" (R. 63, 64). (Italics supplied.)

In the view of the Court below affirming this action of the trial court, "merely an erroneous exercise of that discretion will not require a reversal." (Slip Opinion p. 6, R. 93).

Both courts, in so doing, acted counter to the admonition of this Court in a case long antedating the new Rules of Criminal Procedure (*Hyde v. Shine,* 199 U. S. 62, 78, 25 S. Ct. 760) where Justice Brown speaking for the Court stated:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicil of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not be subjected, if the case can be tried in a court of his own jurisdiction."

Despite this court's admonition the condemned practice continued and resulted in the adoption of Rule 21 (b). See New York University Law School Institute, Federal Rules of Criminal Procedure, pp. 274, 275; and discussion by Judge Yankwich in *United States v. National City Lines,* 7 F. R. D. 393, 395, 396, 397, (D. C. S. D. Calif.).

The cavalier denial of the petitioners' motion cannot and should not be supported on any theory of unreviewable discretionary conduct of a trial judge Once the trial judge is "satisfied that in the interest of justice the proceeding should be transferred to another district" it is mandatory under Rule 21 (b) that the Court transfer the proceedings. Withholding the "satisfaction" thus required must be *bona fide* and reasonable. Judge Yankwich has well stated what is meant by the phrase "in the interest of justice" as follows (7 F. R. D. at 397, 398):

> "The phrase 'in the interest of justice,' like the analogous one which occurs often in statutory enactments, 'in the furtherance of justice,' has a broad

meaning. It implies conditions which assist, or are in aid of or in the furtherance of, justice. Both call for the doing of things which bring about the type of justice which results when law is correctly applied and administered. They import the exercise of discretion which considers both the interests of the defendant and those of society. When commanded by a statute, they do not attempt to determine, in advance, the type of judicial action to be taken. As said by the Supreme Court in a well known case:

> 'The term "discretion" denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with a regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" Citing *Langes v. Green,* 282 U. S. 531, 541, 51 S. Ct. 243, 247.

This Court has recently reiterated its denunciation of the practice which "opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense," and "the appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution." *U. S. v. Johnson,* 323 U. S. 273, 276, 66 S. Ct. 28.

Surely, since questions of venue in criminal cases are not lightly to be dismissed as mere matters of formal legal procedure but "as raising deep issues of public policy in the light of which legislation must be construed" (*U. S. v. Johnson, supra,* at p. 276), a trial court's denial of a proper motion to transfer cannot be immune from review and reversal upon the ground that it is "merely an erroneous exercise of discretion."

If no proper basis existed for the denial of the motion, the resulting error must be rectified. To hold otherwise in this case would be to nullify the plain purpose of Rule 21 (b) and to sanction the pre-determination by the trial judge of petitioners' guilt, as expressed in his statement that if they were to be tried in New York "it seems to me it would be a very easy matter for them to carry on such illegal operations and never have to pay the penalty therefor" (R. 63).

It is amply clear that the denial of the motion to transfer was not "merely an erroneous exercise of discretion", as thought by the Circuit Court of Appeals, but was such an appalling abuse as to require correction and reversal by this Honorable Court.

V.

Since John, the Informer, Was Never a Co-Conspirator With Petitioners, His Statements Could Not be Binding Upon Them and Could Not be Considered in the Determination of Their Guilt.

(Question 5.)

In *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224, this Court, though recognizing the rule that the act of one partner in crime is admissible against the others where it *is* in furtherance of the criminal enterprise, held inadmissible statements of one, previously a co-conspirator, which were *not* in furtherance of the criminal object. It was there held that statements made by a co-conspirator to the federal agents after his apprehension, being a "frustration" of the criminal enterprise, were inadmissible.

A fortiori, the statements of an informer who at all times during the charged conspiracy is working hand in glove with federal agents, reporting each conversation to them, are inadmissible against those whose actions he has reported. Such statements obviously were not made in furtherance of the asserted conspiracy. The error of the

court below in holding John a co-conspirator with the petitioners is manifest in its statement (Slip Opinion, p. 9, R. 325):

> ". . . although John lent his services readily to the Federal agents in assisting in securing evidence of the violation of the Act, nevertheless the jury, with all good reason, could conclude that *his cooperation with the Federal agents did not necessarily relieve him of complicity in the conspiracy.* His purpose in so doing could have been to get a supply of liquor for John's Beverage Company and at the same time to curry favor with the agents in order to keep from being indicted." (Italics supplied.)

Were that the law, then by a parity of reasoning, since John was in co-partnership with Pace and the other Government agents, the statements of the Alcohol Tax Unit investigators to each other and to John would be admissible *against petitioners.* Such an absurdity would indeed increase convictions and make easy the efforts of those employed to enforce the laws. In fact, it would make unnecessary any real efforts at detection. The agents could prevail upon an informer to induce and instigate persons to commit acts asserted to be criminal and could then make a prima facie case against those persons by holding a series of conversations between the agents and the informer, containing all the elements of the offense charged within the dialogue. A jury would, under the reasoning of the court below, then be permitted to conclude that the informer and the agents were co-conspirators with the persons induced to commit the acts denounced as criminal. The hearsay statements would then be admissible and available as substantive evidence upon which to convict!

Here, as in *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224, the admission of John's statements to Pace (R. 646, 648, 649-652) and John's conversations with Hillman (R. 110-116) was not only error, but was harmful, prejudicial

error. It cannot now be said with fair assurance that the jury was not substantially swayed by the use of the statements against all petitioners. *Kotteakos v. U. S.*, 328 U. S. 750, 66 S. Ct. 1239. In fact, it may be said with fair assurance that the jury *was* swayed by such statements. As has already been noted, the court below regarded this as a "legal" entrapment because of Hillman's alleged statements to John and John's repetition thereof to Pace. On this ground alone, reversal is required, *Kotteakos v. U. S.*, supra, and *U. S. v. Blumenthal*, — U. S. —, decided December 22, 1947.

VI.

The Trial Court's Restriction on the Cross-Examination of the Chief Government Witness Was Prejudicial, Harmful Error.

(Question 7.)

Petitioners contend that the trial court deprived them of their most valuable right—that of cross-examining the chief Government witness—by requiring them to conduct a thorough cross-examination of John *not in the presence of the jury* as a condition precedent to their subsequent cross-examining of the witness before the jury. They were forced to join in what amounted to a dress rehearsal.

John had testified in his direct examination to facts which were the foundation of the entire case against petitioners. Only by cross-examination, "the greatest legal engine ever invented for the discovery of truth" (Wigmore on Evidence (2d Ed.), sec. 1367) could petitioners show John in his true light before the jury so that they could judge properly who told the truth in the entire matter. This they could do as a matter of right. *Alford v. U. S.*, 282 U. S. 687, 51 S. Ct. 218.

Yet throughout the trial, Judge Dawkins expressed concern about bringing in matters relating to the "Mississippi mess" (R. 916), and time after time revealed a purpose to protect the record from inclusion of evidence relat-

ing to John's multifarious illicit activities in Mississippi (R. 220; 265-6; 377; 509; 935; 987). Indeed, the contrast between his solicitude for keeping out of the record the tale of Mississippi corruption and his lack of concern for the protection of petitioners' rights is striking.

The jury should have been permitted to learn the truth about John, even if in the process of his cross-examination details of the Mississippi bootlegging corruption might come to light.

When counsel for the petitioners attempted to attack John's credibility by showing on cross-examination his character and his persistent course of law-breaking in Mississippi, the prosecutor objected (R. 191, 195). The Court thereafter *excused the jury* and followed this procedure: He laid down a general rule governing the scope of the cross-examination of the witness and then required counsel for petitioners to question the witness. As the prosecuting attorney phrased it,

> ". . . after these questions are answered you will then rule on what questions may be asked and answered and *then we will repeat those in front of the jury.*
>
> THE COURT: That part that I rule in, will go to the jury." (R. 203) (Italics supplied.)

Counsel for petitioners objected to this procedure but were overruled (R. 203). Thereupon, from page 203 to page 284 of the Record, follows the preliminary cross-examination of John.

The vice in this unique procedure is that the jury is deprived of the opportunity of viewing the *initial* reaction of the witness to the questions put to him and observes the witness's demeanor only *after* he has had one or more chances to answer the same question, when he is freshly rehearsed and knows how to answer. Here, this is particularly evident because John was evasive and shifty throughout this dress rehearsal, so much so that the Court

repeatedly found it necessary to admonish the witness to answer responsively (R. 206; 207; 238; 239; 246; 249; 252; 254; 256). Indeed, during this preliminary cross-examination the Court actually directed the witness to "answer truthfully" and indicated that the informer was lying. At one point the Court stated:

> "THE COURT: You should know that, Mr. John, without qualification. Is it true or not? *I want you to answer these questions truthfully.*" (R. 249)

And, at another, the Court said:

> "THE COURT: Mr. John, you have not answered this man's questions frankly, *because you have changed your testimony once or twice.* You stated that the whiskey was shipped to Henegan and Hieman, and then you testified that the whiskey that was sent to Hieman was taken by you and sold by you in Mississippi. Why didn't you state that at first?" (R. 252; 253) (Italics supplied.)

So that, in effect the witness was instructed how to answer *before the jury.* To hide from the jury these obvious manifestations of untruthfulness, evasiveness and lack of frankness, as well as downright refusals to answer, was to deprive petitioners of the substance of their right to cross-examine.

And it is no answer that the Court was entitled to know the purpose of the inquiry. The right to cross-examine exists without any requirement of showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief. *Alford v. U. S.*, 282 U. S. 687, 51 S. Ct. 218.

Adoption of this unauthorized procedure, over petitioners' objections, destroyed the main criteria by which the jury could judge John's veracity and so deprived them of that fair impartial trial which was their fundamental right.

VII.

The Court Improperly Quashed the Subpoena Directing John to Produce the Books and Records of His Mississippi Business, in Violation of Rule 17 (c) of the Federal Rules of Criminal Procedure, and Thereby Denied Petitioners Their Right to Produce Evidence in Their Own Behalf.

(Question 8.)

On direct examination, John said he was in the whiskey business in Vicksburg, Mississippi, and that his wife was the owner of Johns Beverage Co. in Tallulah, Louisiana (R. 108). Petitioners challenged this and attempted to show that John was the real owner of the Louisiana business which was being operated in her name, as a blind for him, because of John's criminal record (R. 190; 194; 381). In order to establish this and to determine what other crimes involving moral turpitude John may have committed (R. 380; 381) petitioners sought to have his Mississippi books and records produced. They therefore subpoenaed them. The Court ruled that John need not produce these documents because "I am not going into the Mississippi end of it" (R. 509; 376). Evidently, the trial judge felt that any such evidence was "irrelevant." If so, he misconstrued the purpose of Rule 17 (c). Obviously, this rule is to enable discovery. The question of relevance cannot be determined *in limine*. See New York University Law School Institute Proceedings, Federal Rules of Criminal Procedure, pp. 167, 168.

Moreover, there was no showing that the subpoena was "unreasonable or oppressive." Therefore, there was no warrant for quashing the subpoena under Rule 17 (c). Cutting off the inquiry *in limine* was prejudicial error and in violation of petitioners' fundamental right to produce evidence in their own behalf, the barest minimum requirement of due process.

VIII.

The Court's Conduct of the Trial Was Otherwise Prejudicially Erroneous.

(Question 9.)

A.

Improper Remarks of the Trial Judge.

The bias and prejudice of the trial judge is clearly disclosed by his remarks during the questioning of Pace, the chief Alcohol Tax Unit investigator. The Court gave detailed instructions to the prosecuting attorney as to the manner of questioning this witness (R. 647; 652). At one point the trial judge made a categorial statement of fact against petitioners (R. 651; 652).

Pace, after coaching by the judge, was improperly permitted to state that petitioners' "representative [Hillman] was offering to sell whiskey at some $23.00 a case over the celing to various wholesale liquor dealers throughout this district—the 10th District—which was Mississippi, Louisiana and Texas" (R. 648; 651). Petitioners' motion to strike this was denied (R. 651). The damage resulting from this erroneous ruling was compounded when, thereafter, the following statements were made:

> "The Witness: And that the firm was located in New York and that the defendant made these offers to Comell John, and as I said, acting on instructions from the Washington office in New York who had contacted Comell John—or he had contacted us and told us of the plan that was set out to him how he could purchase the whiskey.
>
> The Court: *And told by John's plan as set out to him, by which he, John, could get the liquor*" (R. 651-652). (Italics supplied).

This was a direct statement of fact by the trial judge to the jury against petitioners.

In striking contrast with the Court's solicitude for and protection of prosecution witnesses is his treatment of former Sheriff Buchanan, of Warren County, Mississippi, a defense witness. The Court's browbeating of this defense witness is clear from his remarks before the jury (R. 930; 932; 939; 940) and his warning to Mr. Buchanan while the jury had been excused (R. 937). Moreover, while erroneously limiting the impeachment of the chief Government witness, John, as summarized hereinabove, the Court permitted extensive efforts to show Sheriff Buchanan was implicated in Mississippi bribery to impeach the defense witness (R. 936).

Finally, and most damaging to the petitioners, was the Court's extensive cross-examination of petitioner Weiner (R. 1055-1061).

B.
Errors in Court's Charge.

1.
The Court Assumed that the Sale Was from One Wholesaler to Another and Accordingly Instructed the Jury Only as to the Price Ceilings Governing Such Sales.

One of the major points of defense was that John bought this whiskey for himself, for sale to consumers in Mississippi (R. 1070). Needleman testified to a conversation between John and Kott in which John made statements indicating that John sold whiskey by the fifth and the pint (R. 1067). John might have been both a wholesaler and a retailer. If John was a retailer, an entirely different price ceiling was applicable. (Regulation 445, § 5.4, prescribing ceiling prices to wholesalers; § 5.5, prescribing prices to retailers.) Yet, the court not only failed to define "wholesaler" and "retailer" but assumed as a *fact* that the sale was from one wholesaler to another (R. 1225; 1230). Despite petitioners' calling the matter to the Court's attention, the judge repeated this conclusion to the jury (R. 1260).

In so doing, the Court clearly invaded the province of the jury. This was harmful, prejudicial error since petitioners were entitled to an acquittal if the sale was from a wholesaler to a retailer, there being no proof that the sale was in excess of price ceiling regulations governing sales from a wholesaler to a retailer.

2.

The Court Failed to Define the Offense Properly.

The Court's refusal to instruct the jury as to the definition of a sale from a wholesaler to a retailer, or wholesaler to wholesaler, and to tell the jury what the price regulations provided for in the case of a sale from a wholesaler to a retailer, constituted a failure properly to define the offense charged. The instructions therefore were fatally erroneous. *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402; *U. S. v. Max*, 156 F. 2d, 213 (C. C. A. 3).

3.

The Court Improperly Refused to Caution the Jury on John's Testimony.

The Court's refusal to charge (R. 1261) as requested by petitioners (Request 32 (f) R. 1214) that Comell John was an informer and that his testimony should be examined with greater care and scrutiny than the testimony of an ordinary witness, was prejudicially erroneous. Though there can be no doubt that John was an informer, the trial judge ruled otherwise, asserting that "This was merely a transaction carried on by John to procure some liquor, and he simply called in the agents to come and witness it. I deny the giving of 32-F" (R. 1261).

Here again the Court assumed a fact and reached a conclusion directly contrary to the evidence in the case. At the very least, the jury should have been permitted to decide whether John was an informer.

Petitioners maintain that upon the Government's proof it must be held as a matter of law that John was an in-

former. Accordingly, the requested instruction should have been given and its refusal was prejudicial error. See *Holmgren v. U. S.*, 217 U. S. 509, 524, 30 S. Ct. 588.

4.

The Court's Charge Was Partial, Argumentative and Advocated Belief in the Prosecution's Case.

In discussing the defense evidence by petitioners Weiner and Needleman and by defense witness, Collins, that Weiner was not even in New York during the 10-day period of negotiations there, the Court demolished this defense with these words:

> ". . . and you can consider all of that in the light of ordinary human experience, and in the light of his explanation, as to whether or not it is reasonable, and so forth.
>
> Now then, gentlemen, the *question with regard to all of that testimony is,* is *that a reasonable explanation? Do you believe it? Do you think it is reasonable? Does it satisfy you? Do you think it rings true?*" (R. 1243.) (Italics supplied.)

Even in cold print, realizing the atmosphere of this trial, it is at once apparent that the Court was arguing the prosecution's case. Particularly so, in the light of the Court's further remarks concerning the evidence with regard to John's affidavit (G-2) to this effect:

> "Does that jibe with reason and common sense? If a concern is engaged in a legitimate business is it necessary for that concern to procure from a seller a statement to the effect that that purchaser—I mean to procure from a purchaser a statement that that purchaser has not paid any black market, or over-ceiling money for that commodity?" (R. 1243)

Such argumentative advocacy in favor of the prosecution is fatal error. *Quercia v. U. S.*, 289 U. S. 466, 53 S. Ct. 698.

And, further, after the Court extolled the advantages of a democracy over a dictatorship, he charged the jury as follows:

> "In this country every man, no matter what his race, color, religion, or creed may be, stands before the Courts equally with every other man. It doesn't make any difference whether he is a pauper, or whether he is a millionaire, or whether he is Jew, Gentile, Negro, or any other race, color, creed, he stands before the Bar the equal of any other person when it comes to a decision of his rights, and of his innocence or guilt.
>
> *At the same time we have the duty—you and I are charged with the responsibility here, I as a judge, you as jurors, the District Attorney as the prosecuting officer and those others who are officers of this Court, to see to it that justice is done.*" (R. 1247.) (Italics supplied.)

Apart from the tonal inflection which of course is impossible of reproduction, obviously this statement identifies the prosecution with the Court and virtually directs a guilty verdict since "the influence of the trial judge on the jury is necessarily and properly of great weight." *Starr v. U. S.*, 153 U. S. 614, 626, 14 S. Ct. 919; *Quercia v. U. S.*, *supra.*

5.

Throughout the Trial the Court's Treatment of John's Position Was Inconsistent. His Failure to Clarify This Vital Question in His Charge to the Jury Was Fatally Erroneous.

At one point, the Court stated in the presence of the jury that John was a "co-conspirator" (R. 674, 675); but at another point he stated that John was actively engaged with Government agents to "catch" petitioners (R. 296). This would of course have made him an informer, which obviously he was. Yet, in his instruction to the jury he

stated that John was not an informer (R. 1261). And in yet another portion of the charge he views John as "alleged" by the Government to be a "purchaser" (R. 1236). Such misleading instructions to the jury cannot be regarded as a mere "technical error." Rather, they went to the crux of this case and were harmfully prejudicial to petitioners, and require reversal. *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402.

Conclusion.

We respectfully submit that this is a case which deserves review by this Honorable Court. Grave constitutional questions are directly put in issue. In addition, it is submitted that since this case presents serious questions affecting the administration of federal criminal law it calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners, Israel Needleman and Harry Weiner.
LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.